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No. 99-878

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE W. CRAWFORD and HARRIET CRAWFORD,

Petitioners,

vs.

SIGNET BANK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in the absence of any direct evidence of discrimination, a loan applicant must come forward with evidence that he satisfied a lender's non-discriminatory lending criteria and thus was qualified for the loan in order to state a prima facie case of lending discrimination under 42 U.S.C. §§ 1981, 1985(3).

2. Whether under District of Columbia law, expert testimony is required to determine whether a lender has failed to abide by reasonably prudent lending standards or reasonably prudent appraisal standards.

3. Whether a trial court may in its discretion strike an affidavit of an expert witness used in opposition to a summary judgment motion after close of discovery where the party tendering the affidavit has not previously identified the expert or provided an expert report in accordance with the trial court's scheduling order.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondents Signet Bank and Signet Mortgage Corporation are affiliated with First Union Corporation, a publicly traded company. Signet Bank has been merged into First Union National Bank, which is a subsidiary of First Union Corporation. Signet Mortgage Corporation is a subsidiary of First Union National Bank.

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STATEMENT OF THE CASE

This case arises from Respondent Signet Mortgage Corporation's denial of a mortgage loan to Petitioners George and Harriet Crawford to refinance the indebtedness on their home. The Crawfords' Second Amended Complaint (the "Complaint") alleges race discrimination under 42 U.S.C. §§ 1981, 1985(3) (Counts I and II); negligence against Signet Mortgage and its parent Signet Bank (Count III); [1] and negligence against the independent appraisers who appraised the Crawfords' home (Count IV). The Crawfords also allege vicarious liability of Signet Mortgage and Signet Bank for the alleged negligence of the outside appraisers (Count V) and vicarious liability of the appraisers for one another (Counts VI and VII).

In 1994, Signet Mortgage contacted the Crawfords and urged them to apply for a mortgage loan to refinance the indebtedness on their home. Ultimately, Signet Mortgage did not make the loan because the appraisal on the home came in too low. The appraisal was performed by Respondents Capitol Appraisal Service, Inc. and Stephen Fenning, independent appraisers with no affiliation with Signet Mortgage or Signet Bank. The Crawfords argue that it was discriminatory for the appraisers, in valuing the house, to use as comparables the sales of properties in or near the Crawfords' neighborhood of LeDroit Park, while not using sales of properties located further away in Kalorama or Dupont Circle. The Crawfords also argue that Signet Mortgage was mistaken in relying upon the Capitol appraisal, and not deferring to two outdated appraisals that

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[1] In November 1997, Signet Bank was merged into First Union National Bank, after this suit was filed.

the Crawfords tendered, notwithstanding Capitol's advice that the other two appraisals were flawed.

Following discovery, the District Court granted motions for summary judgment in favor of Signet Mortgage, Signet Bank, Steele, Capitol and Fenning. The Court of Appeals for the District of Columbia Circuit affirmed the trial court's decision. *Crawford v. Signet Bank*, 179 F.3d 926 (D.C. Cir. 1999). On August 23, 1999, the Court of Appeals denied the Crawfords' motion for rehearing or rehearing en banc.

STATEMENT OF FACTS

Although there are no material facts in genuine dispute below, Petitioners' recitation of the record is filled with misstatements. Accordingly, it is necessary for Respondents to recite the facts in detail. Sup. Ct. R. 15.2.

A. Signet Mortgage Solicits The Crawfords In 1994.

In 1994, Signet Mortgage made and sold residential mortgage loans. The Crawfords are African American homeowners residing at 2302 First Street, N.W., in the LeDroit Park neighborhood of the District of Columbia. Mr. Crawford is an attorney.[2/]

According to the Crawfords, in February of 1994, Lonnie Bass of Signet Mortgage contacted them three times by telephone in an attempt to convince them to apply for a loan to refinance their home mortgages. At the time, the

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[2/] The Crawfords were represented in succession by two different law firms. On appeal, Mr. Crawford now represents his wife and himself.

Crawfords had a first mortgage and a more recent second mortgage, taken out in August of 1993. Bass told the Crawfords that to consolidate their existing mortgages, the Crawfords would need a $233,000 loan, and that, accordingly, the property securing the mortgage (i.e., the Crawfords' house) must have a market value of about $311,000.

The Crawfords then provided Bass with information over the telephone to begin processing the loan, including a representation that the house was worth $325,000. There is no evidence that Bass or anyone else knew of the Crawfords' race before the Crawfords were told that they needed to show a market value of $311,000. Nor do the Crawfords have any quarrel with Bass. Mr. Crawford testified that "Mr. Bass . . . was very professional [and] made every effort . . . to try to get us a mortgage."

The minimum necessary appraised value was dictated by Signet Mortgage's written underwriting guidelines. Under these guidelines, the loan the Crawfords sought was deemed a "cash-out" refinancing because funds would be used to pay off the 1993 second mortgage, which was less than 12 months old at the time. Signet Mortgage's underwriting guidelines specified that a $233,000 loan of this type could have a maximum "loan-to-value" ratio of 75%.[3/] Thus, in order to qualify for a $233,000 loan, Signet Mortgage's underwriting guidelines required an appraised value of $311,000. There is no evidence that Signet Mortgage

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[3/] There is no evidence in the record that Signet Mortgage required a 71% loan-to-value ratio, described on page 15 of the Petition. Nor is there any evidence as to what neighborhood their telephone number is assigned.

applied this standard differently with respect to any applicant. According to Signet Mortgage's then head underwriter, who herself is African American, this 12 month rule applied to all applicants.

The Crawfords' allege that Signet Mortgage changed the loan from "no cash out" -- which the Crawfords assert would have permitted a 95% loan-to-value requiring a $245,000 appraisal -- to "cash out" because of the Crawfords' race. This did not happen. An internal memo, dated March 12, 1994, mistakenly designated the Crawfords' loan as "no cash out" before Signet Mortgage learned that the second mortgage was less than 12 months old. The March 14, 1994 credit report is the first information indicating that part of the debt that the Crawfords were refinancing was less than 12 months old, thereby requiring the Crawfords' loan to be deemed a cash out. In turn, a "cash out" loan required a maximum loan-to-value ratio of 75%.[4] There is no evidence in the record that Signet Mortgage knew of the Crawfords' race or the racial composition of their neighborhood at this time.

After the Crawfords provided various information, Connee Piercy of Signet Mortgage underwrote the loan. Piercy conditionally approved the loan in March of 1994, subject to certain conditions, including "[r]eceipt and review of [a] satisfactory subject property appraisal to support a minimum fair market value of $311,000." Signet Mortgage's

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[4] There is also no evidence in the record that the internal March 12, 1994 document was ever provided to the Crawfords at the time of the loan application, that the Crawfords discussed a 95% loan-to-value ratio with Signet Mortgage, or that the Crawfords were told that the loan would be a "no cash out" loan.

underwriting guidelines, in turn, required that this appraisal conform to Fannie Mae guidelines. Piercy was in Baltimore. She had no direct contact with the Crawfords, and did not know their race or the racial composition of their neighborhood.

Bass then sent the Crawfords a typed loan application, dated March 21, 1994, and a letter of confirmation, dated March 24, 1994, to sign. The Signet Mortgage confirmation letter stated that the Crawfords' application for a $233,000 loan was approved "subject to the general and special conditions stated herein." One "special condition" listed was "[r]eceipt and review of a satisfactory subject property appraisal to support a minimum fair market value of $311,000."

B. <u>Signet Mortgage Contacts Steele For An Appraisal.</u>

During 1994, Signet Mortgage utilized Respondent Steele Software Systems Corporation for appraisals. Steele provided outsourcing appraisal services to lenders throughout the United States. Steele, in turn, arranged for Capitol to perform the actual appraisal of the Crawfords' home. Capitol picked Fenning, a licensed and experienced appraiser, to do the work.[5/]

[5/] Between 1991 and 1994, Fenning performed approximately 1,000 appraisals for Capitol, 300 to 500 of which were in D.C. The Petition is full of irrelevant, unsupported attacks on Fenning. For instance, the record does not support the Crawfords' assertion that Fenning did not know D.C. neighborhoods or quadrants. Moreover, as the Crawfords conceded below, there are five expert appraisers in this case who give April 1994 values similar to those of Fenning, or who have reviewed the Fenning appraisal and have found it acceptable. <u>No</u> appraiser has given a materially higher value under oath. All of the

On or about April 8, 1994, Fenning appraised the Crawfords' home at $190,000 after completing a thorough walk-through examination of the home, asking questions about various improvements to the home, and researching various records to compile information about recent sales in the area around the home. Fenning's appraisal cited three recent sales in close proximity to the Crawfords' home as support for his determination. After finding these recent sales, Fenning made various adjustments to the sales prices of those comparables to extrapolate what the probable sales price for the Crawfords' house would be.

In some instances, the comparables had more valuable features, requiring a downward adjustment to the sales price in order to predict the probable sales price of the Crawfords' house. In other instances, the comparables had less valuable features, requiring a upward adjustment.[9/] Fenning did not know the loan amount or the values the Crawfords or others ascribed to the Crawford house.

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appraisers are not on a "approved list." Moreover, for what it is worth, two of the appraisers in this case upon whose testimony Respondents rely are African American.

9/ Thus, for example, Fenning added $10,000 to the sales price of one comparable to account for the fact that the comparable was renovated in the 1970's, whereas the Crawfords' house was renovated more recently in the 1980's. Fenning did not assume that the Crawfords' house was worth the same as another house in the neighborhood, where that house was in worse condition than the Crawfords', as the Crawfords now incorrectly suggest.

C. Respondents Review The Fenning Appraisal.

Bass informed the Crawfords of Fenning's determination, and asked them to supply any information to support their earlier representation that the home was worth $325,000. According to Mr. Crawford, Bass initiated the request. At that time, the Crawfords possessed a number of appraisals that had been performed on their home, including:

(1) a 1989 appraisal at $225,000;
(2) a 1990 appraisal at $304,000;
(3) a 1992 appraisal at $235,000; and
(4) an August 1993 appraisal by one Howard Popkin at $340,000.[7/]

The Crawfords sent the 1990 and 1993 Appraisals to Bass. The Crawfords did not send the 1992 Appraisal or alert Signet Mortgage that they possessed another appraisal that was, in fact, consistent with the Fenning appraisal, and significantly under $300,000. Nor did the Crawfords send the 1989 Appraisal or their personal analysis of their home's value or the value of the post 1989 improvements.

The 1990 and 1993 Appraisals were routed to Jack May, a senior appraiser at Signet Mortgage. May, like Piercy, was

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7/ The 1990 and 1993 Appraisals were performed for high cost, lower balance second mortgages made by non-bank lenders that were neither federally regulated banks nor otherwise subject to the appraisal requirements of Title XI of the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). In contrast, the 1992 Appraisal was performed for a first mortgage loan in a "[f]ederally [r]elated [t]ransaction[]," in accordance with the appraisal requirements of FIRREA. The 1992 loan wound up in the servicing portfolio of First Union Bank.

located in Baltimore, and was unfamiliar with values in D.C. Like Piercy, May had no direct contact with the Crawfords, and did not know either their race or the racial composition of their neighborhood. May forwarded the appraisals to Steele with a request to review the matter. In turn, Steele asked Capitol to do the same.

Capitol reviewed the Fenning appraisal and the other earlier appraisals, and concluded that Fenning's determination of fair market value was reasonable. Capitol indicated in a letter, dated April 19, 1994, that Fenning's

> estimate of market value situates the [Crawfords' home] at the high end [of value] for the neighborhood . . .. The comparables used in our report are all located within .5 miles of the subject [home] and are within 6 months of the appraisal date.

With regard to the 1993 Appraisal, Capitol noted that

> the estimated market value of the [1993] report is not supported by the sited comparables. The predominate value range [of sales] for the subject's neighborhood is $50,000 - $250,000. The comparables [relied upon by Mr. Popkin] are located 1-2 miles away . . . in superior neighborhoods where the predominate value range is significantly higher. (Dupont $200,000-$600,000; Kalorama $300,000-$2,000,000). A

location adjustment [based upon these differences] was not made . . . [despite being] warranted.[8/]

Thus, Capitol informed Steele "that the estimated market value of $190,000 is justified and well supported." An expert appraiser later retained by the Crawfords, Gaylord Curry, had less kind words for the Crawfords' 1990 and 1993 Appraisals, concluding not only that the 1990 and 1993 Appraisals were flawed, but that the 1993 Appraisal "bordered on fraud."

As a quality control measure -- and at its own expense -- Steele ordered a limited, or "drive by," appraisal of the Crawfords' home by another independent appraiser before responding to Signet Mortgage's inquiry. The new appraisal confirmed Fenning's conclusions.[9/]

Thereafter, Steele wrote a letter to May, dated April 26, 1994, outlining efforts undertaken by Capitol and Steele to review Fenning's market value determination, and enclosing a copy of the April 19, 1994 letter from Capitol. Based upon the information from Steele and Capitol, May deferred to

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[8/] The Crawfords imply that the word "superior" is a synonym for white. However, "superior" simply means more expensive. Gaylord Curry, the appraiser hired as an expert by the Crawfords, used the term "superior" in his April 28, 1997 letter to the Crawfords' counsel to describe Dupont Circle and Kalorama. Mr. Curry is African American. Similarly, Gaddie Jenkins, the author of the 1990 Appraisal upon which the Crawfords rely, uses the word "superior" in comparing neighborhoods. Mr. Jenkins is also African American. The Fenning Appraisal, in fact, does not use that word.

[9/] Crawfords' own experts testified that it is not standard practice to order an new appraisal, but it is common for a drive-by appraisal to be conducted to ball park the accuracy of a previous appraisal.

Steele and Capitol's conclusion that the Fenning appraisal was well-founded and that the 1990 and 1993 Appraisals were not. May reported back to the underwriter that Signet Mortgage should rely on the Fenning appraisal.

In turn, underwriter Piercy relied on May's advice. On or about May 4, 1994, Piercy denied the Crawfords' loan application for inadequate collateral. The Crawfords thereupon received notification from Signet Mortgage that the application had been denied for inadequate collateral.

In short, there is no evidence that it was unreasonable -- much less reckless, grossly negligent or an error too obvious to be unintentional -- for May and Piercy to have relied upon the judgment of outside appraisers that Signet Mortgage has regularly employed over 5000 times without incident, instead of deferring to what appeared to be suspect appraisals tendered by the Crawfords. Gaylord Curry, the expert appraiser later retained by the Crawfords themselves, concluded simply by looking at the 1990 and 1993 Appraisals that the appraisals were inflated and that the 1993 Appraisal "bordered on fraud." The Crawfords have thus failed to present any evidence that Signet Mortgage's legitimate business reasons for refusing to make the loan are not worthy of credence.

D. Signet Mortgage Lends On Or Near The Crawfords' Street In 1994.

Throughout 1994, Signet Mortgage approved at least six mortgage loans to African American borrowers on the Crawfords' street and/or close to the Crawfords' home. The Crawfords' application was the only application denied by Signet Mortgage in 1994 in D.C. for which Mr. Fenning or

Capitol performed an appraisal. On other occasions in 1994, Signet made loans to African Americans relying on Capitol/Fenning appraisals.

E. Bradford Concedes His Statistics Prove Nothing.

The Crawfords belatedly attempted to introduce statistics through an affidavit of one Calvin Bradford to argue that Signet Mortgage was more likely to deny loans to minority applicants. The Bradford Affidavit is based upon statistics submitted, pursuant to the federal Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. § 2801, et seq.[10/] Bradford himself conceded in the same breath that none of these numbers prove discrimination:

> These data do not provide all the relevant data . . . needed to compare similarly situated applicants or that would be required to determine the legitimacy or fairness of the outcomes of refinance applications. . . . [T]hey do not prove discrimination.[11/]

[10/] The Crawfords also make baseless accusations about missing data on the race of 51 applicants. As is apparent from the application in this case, an applicant need not disclose race. Where a lender is soliciting applications by telephone, which occurred here, the lender cannot determine the applicant's race without such help.

[11/] Moreover, Bradford did not attempt to perform any test for statistical relevance, as required.

F. The Lawyers' Committee Report Concedes Its Statistics Prove Nothing.

The Report by the Washington Lawyers' Committee cited by the Crawfords has no evidentiary value for the same reason. While the Report purports to control HMDA data for income, it does not purport to take into account credit history, i.e. number of late payments, amount of debt or amount of assets. These are essential credit characteristics upon which every lender underwrites a loan. For this reason, the Lawyers' Committee Report on its face also disclaims that it constitutes proof of discrimination.

G. The Crawfords Mischaracterize The Events Of 1996.

There was no contact between the Crawfords and Signet Mortgage after May of 1994, until the Crawfords' counsel sent a letter to Signet Mortgage two years later in 1996 raising allegations of racial discrimination. The Crawfords bizarrely rely on language in a internal letter written in 1996, as result of their demand, in which May related a conversation regarding the Crawfords' neighborhood as follows:

> two appraisers on the Signet Approved Appraiser's List . . . [told me that] the [LeDroit Park] area started to undergo change in the mid to late 1980's however has not taken off as planned. [sic]

From this, the Crawfords infer a "plan" between Signet Mortgage and various appraisers -- including the experts hired in this case -- "to conspire and control the housing market in LeDroit Park." Petition at 10.

The Crawfords also argue that May (referred to in their Petition as "Signet's Senior Residential Appraiser") concluded that the Popkin appraisal with a market value $340,000 "would be acceptable to a lender," taking out of context language in the letter in which this language is found. Petition at 6. What May really said in the letter is that "[i]f one were to review each appraisal separately, they would be acceptable to a lender." May explained that "[b]y use of the word 'separately,' [he] meant that in isolation, without knowing about the other appraisals or the particular market areas, no one appraisal by itself would look suspect to a lender." Nonetheless, May did not conclude that either the 1990 Appraisal or the 1993 Appraisal was "acceptable," in the specific context at hand where among other things, Signet Mortgage also possessed substantial conflicting information.[12/]

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Regarding The Standard For Proving Lending Discrimination.

The decision of the Court of Appeals in this case is in accord with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and other cases that have addressed *McDonnell Douglas* in the context of alleged lending discrimination. *See Latimore v. Citibank, F.S.B.*, 151 F.3d 712 (7th Cir. 1998); *Noland v. Commerce Mortgage Corp.*, 122 F.3d 551

12/ Furthermore, Calvin Bradford's conclusion cited by the Crawfords, that Signet intentionally discriminated is not based on any "scientific, technical, or other specialized knowledge," and thus carries no weight under Rule 702, Fed. R. Evid.

(8th Cir.1997). Like *McDonnell Douglas* itself, all of these decisions require that a minority applicant provide some evidence that he or she was "qualified" for the loan in order to survive summary judgment in the absence of any direct evidence of discrimination.

A violation of either § 1981 or § 1985(3) requires proof of intentional discrimination. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268-273 (1993); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).[13] The Crawfords concede on page 7 of their Petition that "[d]irect evidence of intentional discrimination is not presented in the evidence." They rely instead upon circumstantial evidence. In turn, under the framework first developed in *McDonnell Douglas*, where, as here, there is no direct evidence of discrimination, a plaintiff must present circumstantial evidence of intentional discrimination by first presenting a prima facie case of discrimination, which "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).[14] *McDonnell Douglas* – an employment case – required at a minimum that the plaintiff prove he was "qualified" for the job and that "despite his qualifications, he was rejected" in order to state a prima facie case. 411 U.S. at 802.

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[13] Petitioners did not invoke any other statutes, i.e., the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, et seq., and the Fair Housing Act, 42 U.S.C. §§ 3601, et seq. These claims would be time-barred.

[14] Of course, a defendant may rebut a plaintiff's prima facie case by showing a justification for the action taken. It then becomes the plaintiff's burden to show that the articulated justification is pretext for discrimination. *Id.*

As the D.C. Circuit noted in its opinion below, the Crawfords failed to introduce proof of an appraisal that vouched for the value of the property as of the time of the loan application, April of 1994. This was an express condition of the loan approval process in order for the Crawfords to show they were "qualified" for the loan, consistent with *McDonnell Douglas*. The Court of Appeals' opinion does not hinge simply on whether the Crawfords offered proof of value, as the Crawfords argue on page 18 of their Petition. Rather, the Court of Appeals concluded that the Crawfords failed to offer proof of a "satisfactory subject property appraisal," an appraisal that would have met Fannie Mae Guidelines. 179 F.3d at 928.

The Crawfords further conceded at oral argument that Respondents had adopted Fannie Mae appraisal guidelines, and that Respondents were entitled to follow these guidelines. As the D.C. Circuit noted, "[t]he Crawfords agreed at oral argument that if appraisers followed the Fannie Mae guidelines, they would be 'okay,' that is nondiscriminatory." 179 F.3d at 928 n.6. It is also undisputed that Fannie Mae guidelines required either an appraisal that was no more than four months old, or a re-certified appraisal performed during the previous twelve months. Neither of the appraisers who performed the 1990 and 1993 Appraisals (nor any other appraiser for that matter) was willing to re-certify their appraisals or otherwise opine under oath that the property was likely worth $311,000 within the relevant time-frame.[15] Moreover, neither the

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[15] The D.C. Circuit did not erect an insurmountable hurdle for a plaintiff, as the Crawfords argue. There is no support in the record for the Crawfords' assertion that the appraisers had to be on Signet Mortgage's "approved list" in order to satisfy Signet Mortgage's criteria or to state a prima facie case. Nor did the D.C. Circuit hold that the

Crawfords' own opinion of the value of their house, nor the opinions of their neighbors relating to their own houses (without any basis of comparison to the Crawfords') prove that an appraiser would have rendered a similar opinion. "[I]t is common knowledge that banks and savings and loans certainly do not accept an individual borrowers' appraisals of their own property, but hire professional independent appraisers to perform that task." *Cartwright v. American Sav. & Loan Ass'n*, 880 F.2d 912, 921 n.15 (7th Cir. 1989).

The foregoing is consistent with *Noland*, notwithstanding the Crawfords' argument to the contrary. *Noland* holds that an applicant must produce evidence that he or she was "qualified" for the loan in order to make out a

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Crawfords would not have been able to meet their burden with a retrospective appraisal. In this case, the Crawfords simply made no attempt to present evidence that a qualified appraiser would have assigned a $311,000 value to the property as of April of 1994, either at that time or retrospectively.

The Crawfords' argument that they should be able to offer evidence of value that was never presented to Signet Mortgage at the time of its decision is also without merit because it ignores the fundamental purpose of *McDonnell Douglas* -- which is to serve as a surrogate for proof of the defendants' discriminatory state of mind. The Crawfords' post hoc rationalization of the value of the improvements to their house and the affidavits of value that the Crawfords obtained from their neighbors are not data that Respondents ever saw in making their decision. Thus, this information cannot prove that Respondents knew the Crawfords were qualified applicants or that Respondents consciously declined to extend a loan to qualified applicants. Likewise, the Crawfords' attempt, over Respondents' objection, to introduce an unsworn, unauthenticated appraisal, dated November 7, 1994, has no probative value because it did not even exist at the time of Signet Mortgage's decision. (This appraisal was also inadmissible because it was (a) unauthenticated and (b) hearsay.)

prima facie *McDonnell Douglas* type claim in the absence of any direct evidence of discrimination. 122 F.3d at 553. The factual record in *Noland*, however, was somewhat different. In *Noland*, there was at least some evidence that the applicant was qualified because the lender told the applicant what the qualifying criteria were and then changed the criteria without informing the applicant of the change until after rejection of the loan. The Eighth Circuit nonetheless upheld the grant of summary judgment for the lender on grounds that the applicant was unable to show that similarly situated non-minority applicants were treated differently. *Id.* Like the applicant in *Noland*, the Crawfords have presented no evidence that similarly situated non-minority applicants were treated differently. In addition, unlike the applicant in *Noland*, the Crawfords failed to introduce evidence that they were qualified.[16/]

Latimore v. Citibank, F.S.B., 151 F.3d 712, 714 (7th Cir. 1998), cited by the Crawfords, is also in accord with the D.C. Circuit's decision below. *Latimore* similarly holds that a plaintiff loan applicant must prove at a minimum that he was qualified for the loan by obtaining an appraisal showing a

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[16/] Furthermore, unlike the lender in *Noland*, Signet Mortgage from the beginning told the Crawfords and the Crawfords understood that Signet Mortgage required a current appraisal showing value of at least $311,000. There is no evidence in the record to support the Crawfords' accusation that Signet Mortgage changed its loan criteria after the fact, or applied its criteria any differently for other applicants. Indeed, the Crawfords conceded at the trial level that this was not an allegation made in the case. As discussed above, Signet Mortgage's guidelines did not allow a 95% loan-to-value ratio here because the proposed loan was not a "no cash out" loan.

value that meets the "bank's 75 percent rule" in order to make out a prima facie claim. 151 F.3d at 715.[17]

Accordingly, there is no conflict among the Circuits that would warrant a grant of a writ of certiorari.

II. The Remaining Issues Are Not Appropriate For The Court To Consider.

The Crawfords' state law negligence claim is one of professional malpractice relating to the performance of an appraisal and/or the processing of a loan application. District of Columbia law requires that the Crawfords introduce expert testimony to prove the applicable standard of care. *District of Columbia v. Hampton*, 666 A.2d 30, 35-36 (D.C. 1995). The Court of Appeals followed established precedent in the District of Columbia. Application of the well-settled elements of proof of a state law cause of action is not an appropriate issue to be resolved by this Court.

Judge Urbina excluded the Popkin affidavit upon the Respondents' motion to strike, per Rule 37(c)(1), Fed. R. Civ. P. The Crawfords never identified Popkin as an expert or submitted an expert report, as required by the August 28, 1997 Scheduling Order, Rule 26(a)(2), and Respondents' discovery requests. Popkin was deposed as a fact witness regarding his own appraisal, i.e., the appraisal that the Crawfords' other expert deemed fraudulent. At his deposition, Popkin testified that he had never even seen

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[17] In addition, like the plaintiff in *Latimore*, the Crawfords could not have shown that they were qualified even if the 95% loan-to-value limit for "no cash out" loans were available because the Crawfords did not have an appraisal demonstrating even a 95% loan-to-value ratio.

Fenning's appraisal. Because Respondents had no notice that Popkin would later offer a critique of Fenning's appraisal, Respondents had no opportunity to cross-examine Popkin (or gather other evidence) to show that Popkin's belated attempt to critique the Fenning appraisal was not competent, admissible summary judgment evidence. There is no conflict among the Circuits as to the appropriate standard of review of a district court's exclusion of witnesses. *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998); *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). Accordingly, this is not a appropriate issue for the Court to address, either.

CONCLUSION

For all of these reasons, the Court should deny the Crawfords' Petition.

Respectfully submitted,

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